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IN THE
Supreme Court of the United States
October Term, 1978
No. 78-1348

CAROLE SHEAR,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

CAROLE SHEAR,

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-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, CAROLE SHEAR, respectfully requests that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit, entered on or about February 8, 1979, affirming a judgment of the District Court for the Eastern District of New York entered on or about September 22, 1978, convicting petitioner after a jury trial of the crimes of Conspiracy to import and to possess with intent to distribute cocaine, in violation of Title 21, United States Code, Sections 841(a)(1) and 846; also, convicted of the crime of Possession with intent to distribute and importation of Cocaine, in violation of Title 21, United States Code, Sections 841(a)(1) and Section 952(a).

As a consequence of these convictions, the petitioner was sentenced to a term of seven (7) years imprisonment to be followed by a special parole term of ten (10) years; in addition, the Court ordered that the petitioner be remanded to the Metropolitan Correctional Facility for evaluation and study, pursuant to Title 18 United States Code, Section 4208(c);

thereafter, on December 13, 1978, in accordance with the findings of the psychiatric study, the petitioner's sentence was modified to the extent that the seven (7) year jail sentence was suspended and petitioner was placed on five (5) years probation, with a special condition of probation being that petitioner receive psychiatric care in the community under the supervision of the United States Probation Department.

OPINION BELOW

The United States Court of Appeals for the Second Circuit affirmed the judgment of conviction without written opinion.

JURISDICTION

The Order of the United States Court of Appeals for the Second Circuit, was rendered from the bench on February 8, 1979.

The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254(1) and under Rule 19(1) of the Rules of the Supreme Court.

QUESTION INVOLVED

1. Was the petitioner's Constitutional rights under the Fifth Amendment to the United States Constitution violated when the government used the petitioner's statements having failed to establish that the petitioner had made a free, knowing, and intelligent waiver of her constitutional rights at or about the time of her arrest and the questioning by the agents of the government?

RULES OF THE SUPREME COURT

Rule 19, Considerations Governing Review on Certiorari.
1. A review on writ of certiorari is not a matter of right, but

of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state of territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been but should be, settled by this court; or *has decided a federal question in a way in conflict with applicable decisions of this court;* or *has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.*

STATEMENT OF THE CASE

The Petitioners, LaMorte and Shear, were returning from Beirut, Lebanon (39)* by way of London; they arrived at JFK on TW Flight No. 701 at approximately 7:50 p.m. on February 2, 1978. After retrieving approximately five pieces of luggage, they went directly to customs; the custom agent on duty was Agent Resnick. After giving their passports and completing custom declarations (27) they then identified which pieces of luggage belonged to each one (the black-LaMorte; the blue-Shear) (35). Agent Resnick then examined the bags and asked if the two large pieces were new (39-40). LaMorte then stated that

*Numerals in parentheses refer to the pagination of the transcript of the trial and pre-trial hearing to suppress evidence.

Air France had lost their luggage going overseas and the two pieces of luggage under question were replacements (41). This fact was apparently verified by DEA Agent Giaimo (154-155). Agent Resnick then felt a heaviness in the bottom of one of the pieces of luggage after he had apparently emptied its contents on the counter. Then he inserted a knife in the bottom of said bag and found a white powder (41-42). He then summoned the senior Inspector Ruoff. Agent Resnick then took the white powder and conducted a field test (O.D.V.) in the staff office. A positive cocaine reaction resulted (43). Immediately thereafter, LaMorte and Shear, were then escorted to the staff office; at approximately 8:50 p.m. (56). Agent Resnick read the Miranda rights to both individuals and advised them that they were under arrest (44-45); Shear then became very nervous (73-74) and quite upset (75). The DEA agents arrived at approximately 9:15 p.m. (151) and they then spoke to both petitioners at the DEA office at the International Arrivals Building (156). A full search of the luggage revealed that a cardboard, the size of the case itself, was glued in place and sealed with masking tape. Several packages of gauze wrapped plastic bags containing cocaine were removed from each suitcase (49 and 55).

DEA Agent Giaimo readvised both of the petitioners of their rights (124). Again, later on, AGent Giaimo reiterated the Miranda rights approximately an hour later at the DEA office and for the first time LaMorte related that he was promised $50,000 to smuggle the cocaine into the United States and deliver it to a Hussein Jaffari Massaholto (128-129) on February 6, 1978. He added that he had told Shear that the suitcases contained hashish (130). There was no testimony in any manner or form as to when LaMorte told Shear that the suitcases contained hashish. Shear eventually stated that she had been told there was hashish in the suitcases. The statements were allegedly made at approximately 12:00 a.m. (131).

Both petitioners testified and denied knowledge, intent, and participation in the cocaine smuggling operation.

The petitioner Shear testified that she reported her luggage

lost in January of 1978 while en route to Beirut, Lebanon (239) and after approximately two weeks subsequent to the report, Air France remunerated the sum of $350 (242-243) to both of the petitioners; on or about January 31, 1978, Air France suggested a particular luggage store to replace lost luggage and damaged luggage; the two bags (luggage) which were paid for by Air France were subsequently delivered to their hotel in Beirut, Lebanon (247). Carole Shear further testified that she packed all of the clothing in their dry cleaning wrappers (248-249) and individually packed her clothing separately from those of Mr. LaMorte.

While at Kennedy Airport at or about the time that the luggage was opened and being inspected, Shear immediately told Agent Resnick that the clothing she had packed in the black bag was now in the blue bag and in complete disarray (249). She stated that the bags were obviously not hers (253-255).

Both of the petitioners acknowledged receiving Miranda warnings but stated that each over and again had requested an attorney (258, 259, 260-261, 263, 268-269, 270-271, 274, 278, 374, 381, 403).

Shear also denied making any incriminating admissions (292-293, 296).

There were no statements that were recorded, written, or preserved in any manner or form. There was no written waiver of any constitutional rights executed by either of the petitioners although such written waivers were available to both DEA agents and custom agents.

PERTINENT FACTS AND TESTIMONY RELATED TO THE PETITIONER'S CLAIM THAT THE GOVERNMENT FAILED TO MEET THE BURDEN OF ESTABLISHING THAT THE PETITIONER WAIVED HER CONSTITUTIONAL RIGHTS UNDER THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION.

Agent Resnick testified at a pre-trial hearing to suppress

evidence that he read the Miranda warnings to Shear and that said "warnings" were given to Shear several times; the agent communicated to other agents the fact that Shear was advised accordingly; Resnick also advised the other agents as well that Shear had made no statement at that point in time.

At the trial, when Agent Resnick testified on behalf of the Government, he further stated that *Shear refused to waive her rights.*

Agent Giaimo testified on behalf of the Government and indicated that he personally advised the petitioner of her constitutional rights; he testified that he advised Shear of her rights several times; he further testified that he advised Shear that she could receive fifteen years in jail for the crime for which she was being charged. He acknowledged that he was himself told by Agent Resnick that Shear was previously admonished of the "Miranda" warnings.

Agent giaimo acknowledged prior use of the waiver forms that are utilized by the government, wherein an accused acknowledges in writing, a waiver of constitutional rights; he further testified that he did not know whether or not such forms were available at his office at the time of the interrogation; in finality, he testified that he did not have Shear sign any waiver forms whatsoever.

Agent Castillo testified at the hearing on behalf of the Government and stated that he was present when Shear received the "Miranda" warnings; he further stated that at the inception Shear denied any impropriety or violation of the law. He also acknowledged that Shear was continually readvised of her constitutional rights.

Agent Castillo also acknowledged the accepted use of waiver forms; however, he testified that no forms were provided for Shear and in fact Shear did not sign any waiver form whatsoever.

Agent Resnick, on cross examination, testified as follows:

At Page 70:

"A. I read her her rights and I asked if she understood. She said, 'Yes.'

Q. Were you present when her rights were read to her again?

A. I was in the room."

At Page 71:

"Q. And the rights were read several times thereafter; am I correct?

A. I would believe so, by DEA, yes."

At Page 72:

"Q. Didn't you tell one of the other officers that you already read her her rights?

A. Yes, I did.

Q. Didn't you make it to other Customs agents, that statement?

A. To Senior Inspector Ruoff.

* * *

Q. Didn't you tell him 'I already gave her her rights?'

A. I said, 'I read her her rights.' "

At Page 73:

"Q. Did she say a single word from the time you saw her to the time you placed her under arrest?

A. Yes.

Q. What did she say?

A. She said at the belt that they lost their luggage and Air France sent them to some store in Beirut, and Mr. LaMorte said, 'Don't say nothing.'

Q. Mr. LaMorte told her to keep quiet, in words to that effect?

A. Yes.

q. Did she comply?

A. Yes.

At Page 74:

Q. And then you went into the rear of the office where you did read her her rights?

A. Yes."

At Page 76:

"Q. Ruoff was still there, am I correct?

A. That I don't know.

* * *

Q. And he was there at the time you read the rights to Shear, the Miranda warning; wasn't it?

A. Yes, I believe so."

At Page 78:

"Q. How long after you read the rights to Shear did the DEA arrive?

A. About approximately 20 minutes."

At Page 81:

"Q. 20 minutes later DEA arrived?

A. Yes.

Q. Who arrived?

A. Agent Giaimo, and another agent with Agent Giaimo."

At Page 82:

"Q. Did you also tell them you read the rights?

A. Yes.

* * *

Q. Did you tell them she made no statement at that point?

A. Yes . . . .

Q. Didn't you tell the DEA that you had already advised her of her rights?

A. Yes."

Agent Resnick testified at the trial at pages 44-45:

"THE COURT: Yes. You read the entire thing that you read him. Read it to them.

THE WITNESS: Okay. I made myself known. I said, "My name is Resnick, U.S. Customs Inspector, Badge Number 1071, advised the person that he was being detained, was under arrest, and I said, 'Before we ask you any questions, it is mu duty to advise you of your rights. You have the right to remain silent. Anything you say can be used against you in Court, or in other proceedings. You

have the right to consult an attorney before making any statement or answering any question, and you may have him present with you during questioning. You may have an attorney appointed by the United States Magistrate or the Court to represent you if you cannot afford or otherwise obtain one. If you decide to answer any questions now with or without a lawyer, you still have the right to stop the questioning at any time, or to stop the questioning for the purpose of consulting a lawyer. However, you may waive the right to advice of counsel or your right to remain silent and answer questions to make a statement without consulting a lawyer, if you so desire. Do you understand your rights?' He said, 'No.' I then went to Miss Shear, I identified myself. I read her the same rights from the card and she answered, 'yes.' 'Do you understand your rights?' and she said—'*Do you waive your rights?' She said 'No.'* "

Agent Giaimo testified as follows:

At Page 100:

"Q. Now, at that time did you interview the Defendants?

A. Yes. Myself and Agent Castillo asked each Defendant separately to accompany us to a separate room which is part of the Customs staff office, but separated by a glass wall, and it's fairly soundproof, and it's got a glass door.

Q. Can you describe what you said to them and what they said to you?

A. Again I advised them that—each of them separately—that they were under arrest."

At Page 101:

"THE WITNESS: That they were each under arrest, and advised them of their Constitutional rights.

Q. How did you do that?

A. By a card that I have. It's a DEA form."

At Pages 103-104:

"Q. Did you, subsequent to your interview with Mr.

LaMorte, did you have an interview with Miss Shear?

A. Yes, I did.

Q. And can you tell us what you said to her and what she said to you?

A. I again advised her of her rights and the fact that she was under arrest.

I asked her if she knew anything about the cocaine in the suitcases, and she said she didn't.

I asked them both a series of standard questions relative to the suitcases, each of them separately, and they denied any knowledge of the suitcases, the contents."

At Page 112:

"Q. Mr. Giaimo, how many times did you advise Miss Shear of her rights?

A. At least once, formally.

* * *

THE WITNESS: At least twice, probably more like three or four times."

At Page 113:

"Q. Did you ever tell her she could get 15 years in this?

A. Approximately 15 years I believe was the maximum.

Q. Did you tell her that she was in lots of trouble?

A. Yes.

* * *

A. I told her if convicted she stood to spend 15 years in jail."

At Page 121-122:

"Q. Did anybody tell you that they had already given the rights to the Defendant Shear?

A. Generally speaking, one of the first questions I asked the inspector is 'Have you advised the Defendants of their rights?'

Q. Which inspector?

A. Seizing inspector, which would be Mr. Resnick.

Q. What did he say?

A. I don't recall.

Q. Didn't you ask him whether he gave any rights?

A. Yes, I did.

Q. What did he say?

A. He said he did."

At Pages 124-125:

Q. You're a DEA agent for how many years?

A. Four years.

Q. You know what a consent form is; don't you?

A. Yes.

Q. And you know what a waiver form is?

A. Yes.

Q. And you know what a rights form is; am I correct?

A. Yes.

Q. And you have these forms available at your office; do you now?

A. Sometimes.

Q. Is it your testimony they weren't available at that night?

A. I don't know if they were or not.

Q. You didn't even look?

A. No.

* * *

Q. Did you have her sign the rights form?

A. No.

Q. Did you have her sign the waiver form?

A. No."

Agent Castillo testified at the trial as follows:

At Page 201-202:

"Q. Were you pre;sent when Miranda warnings were given, if they were given, at the Customs area?

A. Yes, sir.

* * *

Q. Do you remember when Agent Giaimo gave the Miranda warnings to the Defendant Shear?

A. Yes, sir.

Q. Can you give us an approximately time?

A. Shortly after arriving at the TWA terminal at JFK Airport.

Q. And what questions were asked by Agent Giaimo of the Defendant Shear at that time?

A. Normal questions; her name, her age, where she was coming from.

Q. Pedigree questions?

A. Pedigree questions, as well as asking her what the circumstances were behind her bringing in the suitcases to JRK terminal.

Q. What did she say?

A. She stated that she knew nothing about it, concerning how the contraband had been placed in the suitcases.

Q. She was told that there was contraband in the suitcases; am I correct?

A. Yes, sir."

At Page 203:

"Q. Other than the part of the Miranda warnings, was she ever—did she ever ask whether she wanted a lawyer?

A. She was again advised of her rights at the DEA office.

Q. This is the second time?

A. Second time, yes."

At Page 206:

"Q. When you get back to the Customs area, she is again advised of her rights?

A. At the DEA office, yes, she is.

Q. And of course you had forms back there, did you not; waiver forms?

A. I really don't know if there's forms available in the office.

Q. You know what the forms are?

A. Yes, I do.

Q. Those are the forms that act to waive any rights.

A. Yes. I know the forms.

Q. And there's a place where the defendant given the rights can sign their name; am I correct?"

At Pages 209-210:

"Q. All right. Now, did you tell her at any time what she

was going to be charged with?

A. Yes. That she was being charged with violation of the Federal Narcotics Law.

Q. Did you tell her specifically what narcotics?

A. Yes. Cocaine."

REASONS FOR GRANTING THE WRIT

THE GOVERNMENT FAILED TO ESTABLISH THAT CAROLE SHEAR HAD MADE A FREE, KNOWING, AND INTELLIGENT WAIVER OF HER CONSTITUTIONAL RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is now axiomatic, that "Miranda" warnings must be given by law enforcement, to an accused who is in custody before any questioning commences; this is not the end of the law enforcement obligation, but the beginning. Merely reading or advising of the "Miranda" warnings is not enough. It is encumbent on law enforcement to obtain a free, knowing and voluntary waiver of the rights from the very person being or about to be questioned.

Courts have gone so far as to hold:

> "Once it has been determined that a person taken into custody is too upset to assert or waive his (her) rights knowingly and intelligently under Miranda, all questioning should cease until such time as that person is clearly capable of so responding." (Sample vs. Eyman, 469 F.2nd 819 (9th Cir. 1972).)

The *Sample, supra,* Court reasoned that when the Police became aware that the accused was extremely high, emotional, and detached from reality, all questioning should have ceased. The rationale is that police insensitivity flaws any Miranda "waiver" (see also, *U.S. v. Marchildon,* 519 F2nd 337, (8th Cir. 1975).)

This Supreme Court has provided specific guide lines under Miranda, to render the proper and legal admonishments of rights; however, this is not so with regard to the "waiver" aspect. There are no guide lines for the waiver of an individual's rights.

Both Federal and State Law Enforcement officials have adopted a written waiver form, to aid in meeting the onus of

proving a valid waiver by an accused. While the Appellate Courts have held that the mere absence of a written waiver form would not preclude, as a matter of law, an effective waiver of one's rights (U.S. v. Hayes, 385 F.2nd 375, 4th Cir. 1967), it was reasoned and held that the prosecution's heavy burden of showing a valid waiver, was thereby increased where the waiver form was not signed; it becomes apparent that the failure or refusal to sign a waiver form may well be indicative of the accused's lack of understanding of the original Miranda rights as well as the accused's intent not to waive the Miranda rights. (*U.S. v. Nielson*, 392 F. 2nd 849, 7th Cir. 1968).

Almost contemporaneously with the search herein, on February 2, 1978, by Customs Agents, the petitioner Carole Shear expressed serious and alarming surprise that the contents of the luggage being searched was in fact disturbed and switched; the petitioner Carole Shear also immediately acknowledged that the original luggage used in the trip abroad from the United States had been lost and that the Airlines had paid for the "new luggage," now the subject of the instant search. At this point in time, the petitioner was formally arrested and advised of her "Miranda" rights; Custom Agent Resnick unequivocally testified (at the trial) that Carole Shear refused to waive her rights. At page 82, he stated:

> "Q. . . . Do you waive your rights?"
> "A. . . . She said No."

Thereafter, the petitioner was readvised of her "rights" in excess of four or five occasions and eventually made a statement to the effect, many hours thereafter, that she had been told by the co-defeendant, Thomas LaMorte, that the contents of the luggage contained "hashish."

In *Johnson v. Zerbst* (304 U.S. 458), the Court held that it was necessary to establish a waiver demonstrating an intentional relinquishment or abandonment of a known right or privilege. These standards were enunciated in *Johnson, supra,* in the context of demonstrating that the safeguards of a fair criminal trial

be adhered to. There is presently a basic requirement that a "knowing" and "intelligent" waiver be articulated in a case involving the validity of a defendant's decision to forego a right constitutionally guaranteed to protect a fair trial and the reliability of the truth-determining process. (*Schneckloth v. Bustamonte,* 412 U.S. 218). This Court has established an appropriately heavy burden on the Government before "waiver" could be found to be an intentional relinquishment or abandonment of a known right or privilege and the basis for same is found in the preservation of the fairness of the trial process. (*Schneckloth, supra*).

The requirement of a knowing and intelligent waiver has been applied to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial; the standard of a knowing and intelligent waiver has most often been applied to test the validity of a waiver of counsel either at trial or upon a guilty plea. (*Glaser v. U.S.,* 315 U.S. 60; *Van Moltke v. Gillies,* 232 U.S. 708).

The criteria to assess the effectiveness of a waiver has been applied to other trial rights such as the right to confrontation, to a jury trial, to a speedy trial, and the right to be free from twice being placed in jeopardy. (*Brookhart v. Janis,* 384 U.S. 1; *Adams v. U.S.,* 317 U.S. 269; *Barker v. Wingo,* 407 U.S. 514; *Green v. U.S.,* 355 U.S. 184).

The trial guarantees that have been alluded to above also apply to the pre-trial stage of the criminal process and are similarly designed to protect the fairness of the trial itself. (*Schneckloth, supra*).

In *U.S. v. Wade* (388 U.S. 218) the Court indicated that the standard of a knowing and intelligent waiver must be applied to test the "waiver" of counsel at a particular lineup.

It is urged that in order for a waiver of constitutional rights to be effective in any context it must at the very least be clear and unequivocal. *(Fuentes v. Shevin,* 407 U.S. 67.)

In the case at bar, the petitioner Carole Shear unequivocally refused to waive any of her rights. Thereafter, the petitioner

was repeatedly readvised of the "Miranda" rights. In *Brewer v. Williams* (430 U.S. 387), the Court recognized that the statements given by the defendant were obtained only after the law enforcement's use of psychology upon the person of the defendant. The Court recognized that the questioning in *Brewer, supra,* was done with the specific intent to illicit incriminating statements. In the instant case, one can only logically and legally conclude that after Shear refused to waive her constitutional rights, that the repeated Miranda warnings coupled with the long hours of interrogation and subtle reference by the agents to Shear most probably going to jail for 15 years acted and constituted a psychological approach upon her person with the intent to illicit incriminating statements.

It is now basic and fundamental that the prosecution has the weighty obligation to show and demonstrate that the waiver was knowingly and intelligently made. When evaluating this onus upon the prosecution, it is suggested that consideration be given to the underlying facts and the failure of the law enforcement agencies to utilize what is commonly known as a "waiver form."

According to the government version of the underlying facts related to the custodial interrogation herein, the petitioner Carole Shear did not specifically request an attorney; this of course is factually disputed when viewing the petitioner's version of the incidents in question at the trial. This Court has held that the right to counsel does not depend upon a specific request by the defendant. (*Carnley v. Cochran,* 369 U.S. 506; *Miranda v. Arizona,* 384 U.S. 471). As a matter of fact it has been held that all courts must indulge in every reasonable presumption against waiver. (*Brookhart, supra; Brewer, supra*). In the instant case, the government can not deny that petitioner specifically, and unequivocally refused to waive her rights (44-45). The Government must concede petitioner exercised her rights.

The strict standard regarding waiver applies equally to an alleged waiver of the right to counsel whether at trial or at a

critical stage of a pre-trial proceeding. (*Brewer, supra;* Schneckloth, supra).

In the authoritative decision regarding the admonition of constitutional rights, *Miranda v. Arizona, supra,* the Court held at page 723:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise."

As enunciated in *Escobedo v. Illinois* (378 U.S. 478), if the interrogation should continue without the presence of an attorney and a statement should be taken, an exceptionally heavy burden rests upon the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self incrimination and his right to retained or appointed counsel.

An express statement that the individual is willing to make a statement and does not want an attorney closely followed by a decision to speak with law enforcement officers could constitute a waiver; but a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was eventually obtained. (*Miranda, supra*)

In *Carnley v. Cochran, supra,* the Court held:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

Again, in *Miranda, supra,* the Court held that where incustody interrogation is involved, there is no room for the contention that the privilege is in fact waived if the individual

defendant answers some questions or gives some information on her own prior to invoking her right to remain silent at the time of interrogation.

In the instant case, there were hours and hours of incustody procedures and questioning. Considering that at the initial stage of receiving the Miranda warnings, the petitioner Shear in fact refused to waive her constitutional rights, coupled with the lengthy period of time involved herein, and the failure to have waiver forms signed by the petitioner, leads to the conclusion that the Government has failed to demonstrate a knowing and intelligent waiver by the petitioner. In *Miranda, supra,* the Court held at page 724 and 725:

> "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused *did not* validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege . . . . The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."

Notwithstanding the fact that the petitioner Shear did not admit to specific knowledge of the importation and possession of cocaine in the instant case, but made a statement with regard to alleged knowledge of the contents of the luggage containing "hashish," said statements are still effected by the waiver rights. Again, in *Miranda, supra,* the Supreme Court held:

> "No distinction may be drawn between inculpatory statements and statements alleged to be merely exculpatory. If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be ex-

culpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver requirements for any other statement."

It is undisputed that the original law enforcement agency advising Shear of her constitutional rights had in fact conveyed the same to the other agents at the time of turning her over to their custody; there is no question that the obligation of the Custom Agent in relating these facts to the Drug Enforcement Agency should have indicated unequivocally that Carole Shear refused to waive her rights. If there is any argument or dispute as to such fact, it is brought to this Court's attention that one arm of the law has the burden of letting the other arm of the law know exactly what has or has not been done with regard to an accused. In *Santobello v. New York,* 404 U.S. 357, the Court stated at page 433:

"The staff lawyers in a prosecutor's office have the burden of letting the left hand know what the right hand is doing or has done."

It becomes reasonably obvious that the Drug Enforcement Agency in its readvising of Shear of her constitutional rights on numerous occasions after the first admonishment, coupled with the long hours of interrogation, repeated reference to the probability of Shear receiving a 15 year jail sentence, and the failure to sign any waiver forms, was designed to extract a statement from Shear when she had initially refused to waive her rights.

It is respectfully urged that during the pre-trial hearing and the trial herein, the Government has failed to meet the burden of demonstrating a clear and unequivocal waiver of constitutional rights.

Finally, the use of the petitioner Shear's statement by the Government, in their case in chief violated due process as well as

the *Elkins-Mapp* bar to the use of illegally obtained evidence in a criminal proceeding. (*Elkins v. U.S.* 364 U.S. 206; *Mapp v. Ohio,* 367 U.S. 643). The progeny of *Elkins, supra,* deals as well with 5th amendment violations and is not restricted to mere 4th amendment proscriptions.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR A WRIT OF CERTIORARI BE GRANTED.

Respectfully submitted,

MICHAEL S. WASHOR
A Member of the Bar of the United States
Supreme Court

WASHOR & WASHOR, ESQS.
Attorney for Petitioner
on Petition for Certiorari

APPENDIX

APPENDIX "A"
CONSTITUTIONAL AMENDMENTS

ART. V

No person shall be held to answer for a capital or otherwise infamous crime, unlesls on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law nor shall private property be taken for public use, without just compensation.

Supreme Court, U. S.
FILED
MAY 9 1979
MICHAEL RODAK, JR., CLERK

Nos. 78-1348 and 78-1388

In the Supreme Court of the United States

OCTOBER TERM, 1978

CAROLE SHEAR, PETITIONER

v.

UNITED STATES OF AMERICA

THOMAS LaMORTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The oral opinion of the court of appeals is unreported (Appendix, *infra*, 1a-4a).

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1979 (LaMorte Pet. App. 4a). The petition for a writ of certiorari in No. 78-1348 was filed on March 2, 1979. The petition for a writ of certiorari in No. 78-1388 was filed on March 12, 1979

and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, petitioners voluntarily waived their right to remain silent after being advised of their *Miranda* rights.

2. Whether the district court abused its discretion in denying a mistrial motion based on an alleged difference in the testimony of a government witness at trial as compared to his testimony at the suppression hearing.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, each petitioner was convicted on one count of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), one count of importing cocaine, in violation of 21 U.S.C. 952(a), and one count of conspiracy to commit the foregoing offenses in violation of 21 U.S.C. 846. Petitioner LaMorte was sentenced to concurrent terms of seven years' imprisonment on each count, to be followed by a special parole term of 15 years, and a total fine of $22,500. Petitioner Shear received a suspended sentence of seven years' imprisonment on each count and was placed on five years' probation. The court of appeals affirmed (Appendix, *infra*).

At approximately 7:50 p.m. on February 2, 1978, petitioners arrived at Kennedy Airport on an international flight originating in Beirut, Lebanon. After claiming five pieces of luggage at the baggage counter, they proceeded to the United States Customs checkpoint. LaMorte told the Customs inspector that one large and one small bag were his, and that the other large suitcase and two smaller bags belonged to his traveling companion, Shear. The inspector noticed that the two large suitcases looked as if they had been purchased abroad, but were not listed on the customs declaration form. He asked LaMorte if their declaration was complete, and LaMorte responded affirmatively. The inspector then specifically inquired about the two suitcases whereupon LaMorte stated that the suitcases were old rather than new (1 S.H. Tr. 37, 40-42).[1]

At that point, the inspector began examining Shear's large blue suitcase. When he asked LaMorte if it was his, LaMorte replied that it was not and added "But you must understand these are not our cases." LaMorte explained that Air France had lost their luggage overseas and that the suitcases belonged to Air France. When Shear stated that Air France had sent them to a store in Beirut to purchase the luggage, LaMorte told her "Don't say anything." As the inspector probed inside LaMorte's black suitcase, he sensed the suitcase bottom to be "abnormally heavy * * * and also a bit thick." Accordingly, the inspector removed the contents of the suitcase, cut into the inner lining, and discovered that cardboard had been taped to the inside of the bag. After summoning his supervisor, the inspector punctured the cardboard with a knife and found a white powder secreted underneath. A field test of the powder indicated that it was cocaine (1. S.H. Tr. 43, 46-48, 73, 89-90).[2]

---

[1] "S.H. Tr." refers to the transcripts of the suppression hearing held on May 30-31, 1978.

[2] In the interim LaMorte also told the customs supervisor that Air France had lost their luggage and had given them these suitcases. When the supervisor challenged this story, stating that airlines usually make cash settlements for lost luggage, LaMorte backtracked, now asserting that indeed Air France had given petitioners money and that they had then purchased the suitcases at a store (2 S.H. Tr. 40).

Following identification of the powder as cocaine, the Customs officials directed petitioners into their office, conducted a similar probe of Shear's suitcase, and again discovered cocaine secreted underneath a false bottom in that suitcase. Thereupon the inspector arrested both petitioners, separately read each petitioner his rights in accordance with *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and ascertained that both petitioners understood their rights. When both petitioners then stated that they did not wish to waive their rights (1 S.H. Tr. 49-50, 1 Tr. 44-45), the Customs officials did not ask petitioners any further questions. At no time did petitioners request counsel (1 S.H. Tr. 48-50; 1 Tr. 44-45).

Within an hour, DEA agents Joseph Giaimo and James Castillo arrived at the Customs office to take over the investigation. Although the agents were told by the Customs officials that petitioners had been arrested, the agents were apparently unaware of petitioners' initial decision to remain silent. After testing the cocaine, the DEA agents informed LaMorte and Shear individually that they were under arrest and again advised them of their *Miranda* rights. At this time, LaMorte expressly stated that he understood his rights, that he would like to answer questions, and that he did not want to consult with an attorney. When Giaimo asked about the cocaine in the suitcases, LaMorte said that he did not know how it got there and denied that he was going to deliver the suitcases to anyone. Similarly, Shear acknowledged that she understood her rights and said that she would respond to the agents' questions without a lawyer. She too denied knowledge of the cocaine that was found in her suitcase (1 S.H. Tr. 100-105, 114, 199-202; Tr. 122-124).

Shortly thereafter, the agents took petitioners to the DEA office in another part of the airport to process petitioners. At approximately 11:30 p.m., the DEA agents readvised LaMorte of his *Miranda* rights and asked him if he wished to continue talking with the agents. LaMorte responded that he still understood his rights and that he would like to answer questions. LaMorte then stated that on January 23, 1978, he had been offered $50,000 by a man named "Jerry" to smuggle the cocaine from Lebanon into New York. LaMorte said that he had been instructed to deliver the suitcases containing the cocaine to a man named Hussein Jaifar, who would be registered at the Plaza Hotel in New York City, and that Jaifar would pay him for his services. Finally, LaMorte told the agents that petitioner Shear thought she was smuggling hashish rather than cocaine. Thereafter the agents also readvised Shear of her *Miranda* rights, which she said she understood but which she did not choose to invoke. When asked if she knew about the cocaine in the suitcase, Shear, after consulting with LaMorte, answered that LaMorte had told her they would be smuggling only hashish into the country (1 S.H. Tr. 106-110, 205-209, 229-234).

Before trial petitioners moved to suppress both the statements made to the Customs officials prior to petitioners' arrest and the statements made subsequently to the DEA agents at the DEA office. Following a hearing at which petitioners did not testify, the court held that the statements made by petitioners prior to their arrest constituted routine Customs discussions and were thus not the product of custodial interrogation. The court further found that petitioners' post-arrest statements were admissible at trial because petitioners had been fully informed of their *Miranda* rights and had nonetheless voluntarily and knowingly chosen to talk (3 S.H. Tr. 3A-4A).

ARGUMENT

1. Petitioners contend (Shear Pet. 14-21; LaMorte Pet. 10-18) that they did not voluntarily, knowingly and intelligently waive their *Miranda* rights, and that their post-arrest statements to the DEA agents were therefore inadmissible at trial.[3] In particular, petitioners rely on the facts that they initially chose to remain silent, that they did not sign a written waiver of rights form, and that the agents mentioned that importation of cocaine is punishable by up to 15 years' imprisonment to show that they were coerced into making inculpatory statements. However, these essentially factual claims concerning the specific circumstances of their custodial interrogation were rejected by both courts below, and further review by this Court is unwarranted. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). Moreover, careful analysis of petitioners' claims demonstrates that their voluntary statements were properly admitted into evidence at trial.

a. Petitioners claim that because they initially chose to remain silent at the time of their arrest by the Customs officials, they could not thereafter have voluntarily waived their *Miranda* rights. But in *Michigan* v. *Mosley*, 423 U.S. 96 (1975), this Court squarely rejected the contention that a defendant's initial decision to remain silent precludes his subsequent voluntary waiver of his *Miranda* rights. Rather, the Court concluded that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether [in the circumstances of the particular case

[3]Petitioners have apparently abandoned their challenge to the admission of their statements made to the Customs inspectors prior to their arrest.

the defendant's] 'right to cut off questioning' was 'scrupulously honored.' " *Id.* at 104. Here, as the courts below concluded, petitioners' right to remain silent was scrupulously honored.

Following their arrest, petitioners received the appropriate warnings from the Customs officials. They both stated that they understood those rights and that they did not wish to talk. This request was "scrupulously honored."[4] Approximately one hour later, DEA agents arrived at the Customs office where petitioners were being held. The agents gave petitioners a fresh set of *Miranda* warnings, ascertained that petitioners understood those rights, and asked them if they desired to answer questions.[5] Both petitioners stated that they understood their rights, that they did not want a lawyer, and that they would now answer questions. Shortly thereafter, the agents took petitioners to the DEA office, whereupon petitioners were again given their rights and again voluntarily chose to make statements. In sum, "[t]his is not a case * * * where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." 423 U.S. at 105-106.

[4]Petitioners did not ask for or consult with counsel at any time (3 S.H. Tr. 4-A). This case accordingly does not implicate the special concerns addressed in Mr. Justice White's concurring opinion in *Mosley* (423 U.S. at 110 n.2) or arguably presented in *Rhode Island* v. *Innis*, cert. granted, No. 78-1076 (Feb. 26, 1979) that arise in cases in which the suspect has requested to consult with counsel before questioning. Moreover, since the Sixth Amendment right to counsel had not attached at the time of petitioners' post-arrest statements, this case is clearly distinguishable from *Brewer* v. *Williams*, 430 U.S. 387 (1977).

[5]These agents were apparently unaware of petitioners' prior refusal to answer questions (1 S.H. Tr. 200-205).

b. Petitioners also suggest that their failure to sign a written waiver of their rights constitutes strong evidence that their statements were coerced. At the outset, we note that neither the Customs officials nor the DEA agents ever asked petitioners to sign a waiver form (1 S.H. Tr. 206-207). Thus, there is no factual basis for the inference that petitioners seek to have the Court make. Moreover, as the Court recently noted in *North Carolina* v. *Butler*, No. 78-354 (Apr. 24, 1979), slip op. 4, 6 n.5, an express written waiver of the right to remain silent is not an essential prerequisite to the waiver of *Miranda* rights.

c. Finally, petitioners contend that the authorities coerced them into talking by threatening them with prison and by taking advantage of the many hours of custody and petitioners' emotional states. However, these factual claims were correctly rejected by the courts below. Petitioners first agreed to answer questions within an hour of their arrest, and all of their statements were made within three hours of their arrival at the airport. Furthermore, the district court specifically found that there was "[n]o evidence of coercion or trickery" and that petitioners "knew and understood the warnings," were "in control of their mental and physical faculties," and were not "distraught or unable to know what they were doing" (3 S.H. Tr. 3A-4A).[6]

[6]The DEA agent's accurate statement to petitioner LaMorte that he could get up to 15 years' imprisonment if he was convicted was not coercive, since the agent did not tell LaMorte that he automatically would get such a sentence if he did not cooperate and talk (1 S.H. Tr. 113-114, 134-135). See *United States* v. *Armedo-Sarmiento*, 545 F. 2d 785, 792 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977).

2. There is also no merit to petitioner LaMorte's contention (Pet. 19-21) that the trial judge should have declared a mistrial in light of the alleged change in testimony of the Customs inspector. At the suppression hearing, the inspector testified that after arresting petitioners he read them the *Miranda* warnings and ascertained that they understood their rights. The inspector further testified that petitioners made no statements whatsoever at that time (1 S.H. Tr. 69-74). Although the inspector did not expressly state that petitioners had declined to waive their rights at that time, that conclusion was certainly suggested by the inspector's testimony concerning petitioners' complete silence following their receipt of the *Miranda* warnings. Had petitioners' counsel wished to emphasize this point further, they could have either questioned the inspector about petitioners' silence during the course of their extensive cross-examination or placed petitioners on the stand. They did neither.[7]

At trial, the inspector made explicit what was implicit in his prior testimony, namely that petitioners had chosen to remain silent immediately after they were given the *Miranda* warnings for the first time (1 Tr. 45). Because this testimony was consistent with the inspector's testimony at the suppression hearing, petitioners' assertion that the inspector "materially altered" his testimony is erroneous. Moreover, as we have noted in point 1*a* above, the government never asserted that petitioners waived their rights at this juncture, nor did it attempt to introduce any

[7]Petitioner LaMorte claims (Pet. 20) that these tactics would have been unavailing because "six government agents back up [sic] [the inspector's] substantial misstatement." But the inspector, who was the government's first witness, was the only witness to recall this episode with clarity. The other government witnesses either were not present at that time or were unable to remember what occurred (2 S.H. Tr. 45-46).

statements made at that time.[8] Rather, the government demonstrated that an hour later, when the DEA agents gave petitioners a second set of warnings, petitioners knowingly and voluntarily waived their rights. In these circumstances, the district court correctly denied petitioners' motion for a mistrial.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN VOORHEES
Attorney

MAY 1979

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[8]Indeed, no questions were asked by the Customs officials at that point.

APPENDIX

(The following statement does not constitute a formal opinion of the court and is not to be reported. It shall not be cited or otherwise used in unrelated cases.)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Dkt. No. 78-1350

-against-

THOMAS LAMORTE and CAROLE SHEAR,
Defendants-Appellants.

Before:

HON. STERRY R. WATERMAN, WALTER R. MANFIELD and WILLIAM H. TIMBERS, *Circuit Judges.*

New York, N.Y.
February 8, 1979

STATEMENT MADE BY THE COURT AT DISPOSITION OF APPEAL IN OPEN COURT

JUDGE MANSFIELD:

I believe you are aware that our custom, where we believe that nothing of precedential value would be served by rendering a written opinion, is to dispose of the case from the bench and that is what we are going

to do in this case. We have read your briefs very carefully. We've reviewed the pertinent portions of the record and we are going to affirm. That's no reflection upon the competency of either of you two gentlemen. You've presented your cases very well, argued them well, and I think you have put your points in the best light in which they could be put. But we do not think they are sufficiently persuasive to require reversal here.

Very briefly, I'll state our reasons for the record as best I can. This is an appeal by the two appellants from convictions of three counts charging unlawful possession and importation of cocaine in violation of Title 21 U.S.C. §841 after a jury trial before Judge Bramwell. The principal contention upon this appeal is that statements made by the appellants following their arrest at the airport, Kennedy Airport, upon arrival from Lebanon via London, were improperly admitted into evidence at trial because they were obtained by the authorities without valid waiver of their rights to remain silent and to counsel and that a new trial should have been granted in light of evidence discovered after trial.

I will not review the facts in detail except to say that on the evening of February 2, 1978, these two appellants arrived at the airport. A customs agent named Resnick, after searching their baggage found secreted in a false bottom of one of the bags white powder that was identified as cocaine and, after identifying himself and advising the appellants of their rights, he asked them whether they wished to waive their rights and they said, "No, they did not." He then suspended any further questioning. After about an hour or so an agent of the Drug Enforcement Administration arrived on the scene and he took over the matter and assumed jurisdiction. He advised the

appellants of their rights, doing so independently, first with LaMorte. Each of them said that they were willing to answer questions and I think Shear also said that she did not want a lawyer and answered the questions. Each denied any knowledge of the cocaine being in the baggage.

There followed further testimony by Agent Giaimo regarding the events of that evening. This evidence of their statements was the subject of a motion to suppress at which the agents testified but the appellants, who had the right to do so without their testimony being admitted at trial, chose not to do so. The judge concluded that he would deny their motion to suppress and from that denial the defendants appealed. Applying the principles set forth by the Supreme Court in *Michigan* v. *Mosley*, 423 U.S. 96, and in our court in *United States* v. *Cullums*, 462 F. 2d 792, to the effect that an initial refusal to waive on the part of a defendant does not preclude further efforts, after a reasonable period of time and after further warning of constitutional rights, to see whether the suspect will talk, we find that in this case that there was no violation of the constitutional rights of the defendants to remain silent and to refuse to do anything without counsel. Accordingly we believe that it is necessary here to confirm that the statements were voluntarily made and that they were not obtained in violation of the defendants' rights.

As for the newly discovered evidence point, we find that the evidence was not sufficient to entitle appellants to a new trial under the standards that we have established in this district. I refer specifically, for instance, to our decision in the *Stofsky* case. *United States* v. *Stofsky*, 527 F. 2d 237 (1975).

As for the point raised that there was insufficient evidence that the appellant Shear knew the baggage contained cocaine and believed it contained hashish rather than cocaine, we've already ruled on several occasions, the last of which was the *United States* v. *Morales*, 577 F. 2d 769 (2d Cir. 1978), with which Judge Waterman is quite familiar, that the defendant need not know the exact nature of the regulated drug to violate §841.

Accordingly, we affirm the judgments of conviction with respect to those appellants.

see

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